

**BEFORE THE APPEALS BOARD  
FOR THE  
KANSAS DIVISION OF WORKERS COMPENSATION**

**KELLY P. BROWN**

Claimant

VS.

**CHANUTE HEALTHCARE CENTER**

Respondent

AND

**PREMIER GROUP INSURANCE CO.**

Insurance Carrier

Docket No. 1,037,354

**ORDER**

Claimant requests review of the March 1, 2013, Award by Administrative Law Judge (ALJ) Bruce E. Moore. The Board heard oral argument on June 4, 2013.

**APPEARANCES**

William L. Phalen of Pittsburg, Kansas, appeared for claimant. Terry J. Torline of Wichita, Kansas, appeared for respondent and its insurance carrier (respondent).

**RECORD AND STIPULATIONS**

The Board has considered the record and adopted the stipulations listed in the Award. At oral argument respondent stipulated that claimant provided timely notice and timely written claim of her thoracic spine injury and timely written claim of her lumbar spine injury. However, respondent continues to dispute that claimant provided timely notice of her alleged lumbar spine injury.

**ISSUES**

ALJ Moore found claimant: (1) proved she sustained a personal injury by accident involving her thoracic spine arising out of and in the course of her employment with respondent; (2) gave timely notice of her accident; (3) failed to prove that she sustained a personal injury by accident involving her lumbar spine arising out of and in the course of her employment with respondent; and (4) failed to sustain her burden of proof that she suffered any permanent impairment as a result of the June 11, 2007, accidental injury. The ALJ also determined that respondent could pursue reimbursement of medical

expenses incurred after June 11, 2007, for lumbar and left leg complaints from the Kansas Workers Compensation Fund by application to the Director.

Claimant requests review of the ALJ's findings that claimant did not sustain a personal injury by accident involving her lumbar spine arising out of and in the course of her employment with respondent and that claimant failed to prove she sustained a permanent partial impairment.

Respondent argues the ALJ's Award should be affirmed.

The issues on review are:

1. Did claimant, as a result of her thoracic spine injury, sustain a permanent functional impairment?
2. Did claimant sustain a lumbar spine injury by accident arising out of and in the course of her employment with respondent?
3. If so, did claimant, as a result of her lumbar spine injury, sustain a permanent functional impairment?
4. Did claimant provide timely notice to respondent of the alleged work-related accident that resulted in her lumbar spine injury?
5. If claimant sustained a permanent partial impairment, what is the nature and extent of her disability?
6. If claimant sustained a permanent partial impairment, what is her average weekly wage?
7. Is claimant entitled to future medical treatment?

#### **FINDINGS OF FACT**

Having reviewed the evidentiary record filed herein, the stipulations of the parties, and having considered the parties' briefs and oral arguments, the Board makes the following findings of fact and conclusions of law:

The ALJ's Award sets out findings of fact that are detailed and accurate and it is not necessary to repeat all of those findings of fact herein. The Board adopts the ALJ's findings of fact as its own.

On Monday, June 11, 2007, claimant was employed as a certified nursing assistant (CNA) for respondent, and was assisting a co-worker in double-lifting an overweight patient

from a bed to her wheelchair. Claimant heard a pop and had an immediate onset of pain in her back. Claimant reported the accident and completed an accident report, in which she described her injury as "Pain affecting chest area, L. arm & upper back."<sup>1</sup> She also drew circles on a diagram of the human body on the accident report, indicating pain to the mid-to-upper back, chest and left arm.

Claimant testified that she reported the June 11, 2007, accident the same day it occurred to the charge nurse and to Laurel Jones, who takes care of workers compensation for respondent. On the accident date, claimant was sent by respondent to see Dr. Kueser. Claimant testified that while she was employed by respondent, she would report her back was worsening to her charge nurses, but was not taken seriously. None of claimant's charge nurses nor Ms. Jones testified.

Claimant testified that she was scheduled to work on September 27 and 28, and October 13 and 14, 2007, but did not do so because of excruciating back pain. Claimant alleged that she called into work. However, Elizabeth A. Shepard, who works for respondent and was requested to produce claimant's personnel file, testified claimant's last day worked was September 14, 2007, and that she was discharged for missing work and not calling in.

At the regular hearing, claimant testified that she saw no health care providers from June 11, 2007, when she saw Dr. Kueser, until she went to the Neosho Memorial Regional Medical Center (Neosho Medical) emergency room on October 14, 2007.<sup>2</sup> However, at her deposition, claimant acknowledged she saw Demie Ahlquist, a physician's assistant, in July and September 2007. Claimant indicated that she had ADD and the visits consisted of a ten-minute examination regarding her medications and the side effects. According to claimant, she was not physically examined by Ms. Ahlquist during either visit. Claimant was not surprised that Ms. Ahlquist's notes for those visits did not mention back pain or a back injury, as claimant did not see Ms. Ahlquist for a back injury.

Ms. Ahlquist testified that each time she saw claimant, claimant was asked if her medical history had changed. Ms. Ahlquist went through a list of physical changes, including whether claimant had any musculoskeletal changes or any pain at all. The purpose was to make sure claimant was not having adverse side effects from the ADD medication. After learning of claimant's back injury, Ms. Ahlquist was surprised that at the July 17 and September 17, 2007, appointments, claimant did not mention back pain or a

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<sup>1</sup> Brown Depo., Ex. F.

<sup>2</sup> The Neosho Medical records are not clear as to what date the first emergency room visit took place. The records indicate claimant was seen around midnight, but records for that time of treatment include both dates of October 13, 2007, and October 14, 2007. Other Neosho Medical records for a different emergency room visit around 7 p.m. on October 14, 2007, indicate claimant was seen in the emergency room "last night," which actually may be a reference to earlier in the day (around midnight) of October 14, 2007.

back injury. In November 2007, Ms. Ahlquist did a well woman examination of claimant and claimant mentioned having lumbar spine pain, but the cause of the back pain was not discussed. In a subsequent visit in January 2008 regarding her medication, claimant again did not mention back pain.

On February 18, 2008, ALJ Thomas Klein appointed the first available physician at the Dickson-Diveley Clinic to perform an independent medical examination (IME) on claimant and provide treatment recommendations and a causation opinion. That order did not prohibit the parties from contacting the doctor before or after the evaluation of claimant. The first available physician was Dr. Thomas L. Shriwise. Dr. Shriwise saw claimant one time, on March 27, 2008, and was provided claimant's first MRI report and medical records from Dr. Kueser, Neosho Medical, and Dr. Prostic. His report stated there was a chance that claimant had a back strain from her injury. He also recommended another MRI to rule out the possibility that claimant had a back tumor.

Dr. Shriwise's opinion on causation changed after receiving a telephone call and a letter dated October 27, 2011, from respondent's attorney with additional medical records and an accident report attached. In a letter dated November 2, 2011, to respondent's attorney, Dr. Shriwise indicated claimant's left leg sciatic pain more probably than not started with a twisting injury in October 2007 that occurred after she no longer worked for respondent. He testified that he did not believe that as a result of the June 11, 2007, accident claimant sustained a low back injury, but rather sustained a low back injury sometime in October 2007. Dr. Shriwise was not asked to give claimant a functional impairment rating.

On January 12, 2009, ALJ Klein appointed Dr. Pat D. Do to perform an IME on claimant and provide treatment recommendations and a causation opinion. If treatment was recommended, Dr. Do was to provide the treatment. That order did not prohibit the parties from contacting Dr. Do before or after his evaluation of claimant. Apparently Dr. Do was unavailable, as Dr. David W. Hufford provided ALJ Klein with an IME report dated April 10, 2009. In the report, Dr. Hufford opined that claimant's back injury was work related. Dr. Hufford reviewed claimant's first MRI, which suggested degenerative disc disease at L5-S1 with a suggestion of a herniated disc fragment to the left. He recommended another MRI because there may have been a tumor in that area of the back and not a disc fragment.

On August 14, 2009, Dr. Hufford sent a letter to ALJ Klein indicating that a repeat MRI showed claimant had no evidence of focal disc herniation or neural foraminal encroachment. He then opined claimant was in DRE Lumbosacral Category II and had a 5% whole person functional impairment.

Dr. Hufford testified that after reviewing medical records from Neosho Medical and meeting with respondent's counsel, he changed his opinion on causation. According to Dr. Hufford, claimant injured her lumbar spine in a fall at home, rather than at work on

June 11, 2007. However, Dr. Hufford admitted he could not find a document from Neosho Medical that indicated claimant fell at home. Dr. Hufford indicated that if claimant did not injure her back in a fall at home, then he would revert to his original causation opinion.

**PRINCIPLES OF LAW AND ANALYSIS**

Did claimant, as a result of her thoracic spine injury, sustain a permanent functional impairment?

The only time claimant saw a physician for her thoracic spine injury was when she saw Dr. Kueser on the day of her work accident. Claimant never sought, nor received any medical treatment for her thoracic spine. No physician has opined that claimant sustained a permanent impairment of the thoracic spine. Accordingly, the Board concurs with ALJ Moore and finds claimant failed to prove she sustained a permanent functional impairment of the thoracic spine.

Did claimant sustain a lumbar spine injury by accident arising out of and in the course of her employment with respondent?

Claimant's Application for Hearing alleged she sustained a single traumatic injury. As stated above, claimant reported a mid-to-upper back injury and reported the same to Dr. Kueser. Claimant saw her physician's assistant, Ms. Ahlquist, in July and September 2007. Ms. Ahlquist went through a list of physical changes with claimant, including whether claimant had any musculoskeletal changes or any pain at all, and claimant did not indicate she had any physical changes. Claimant testified that her work activities after the June 11, 2007, accident caused her back symptoms to worsen and that she reported to her charge nurses that her back condition was getting worse. Claimant saw Ms. Ahlquist on September 17, 2007, and did not mention having back pain, yet approximately ten days later missed work for two days due to excruciating back pain. It is not credible that claimant repeatedly reported to respondent's charge nurses that her back condition was getting worse, but was silent when specifically asked if she had any physical changes by Ms. Ahlquist.

Shortly after midnight, on October 14, 2007, claimant sought treatment for the first time for her low back at the emergency room. There is some dispute as to whether claimant reported an intervening accident to personnel at Neosho Medical. Neosho Medical's records from claimant's first emergency room visit indicated that her back pain started a couple of months earlier since a work accident lifting someone.

The notes from claimant's second visit to Neosho Medical on October 14, 2007, indicated the pain started Friday when claimant twisted and felt a pop. Additional handwritten notes from that record appear to state claimant's back pain "1st started 2-3 mo

ago on injury at work.”<sup>3</sup> “[W]ork” is then circled with a notation “1st Twisted at \_\_\_\_\_.”<sup>4</sup> The last word is not decipherable. Respondent asserts the undecipherable word is “home” and that claimant reported to Neosho Medical that she sustained an injury at home. The note from claimant’s second visit to Neosho Medical was pivotal, as it was used by respondent’s attorney to convince Drs. Shriwise and Hufford to change their causation opinions.

ALJ Klein’s orders appointing Drs. Shriwise and Hufford to conduct an IME contained no prohibition against either counsel from contacting Drs. Shriwise and Hufford. That left the door wide open for either party’s attorney to contact Drs. Shriwise and Hufford. Respondent’s attorney contacted Drs. Shriwise and Hufford and, in doing so, did not violate the terms of ALJ Klein’s abbreviated orders.

The Board, like ALJ Moore, adopts the second causation opinions of Drs. Hufford and Shriwise that claimant’s lumbar spine injury was not caused by the June 11, 2007, lifting incident. Dr. Shriwise reviewed medical records from Ms. Ahlquist, reports of Dr. Hufford and an accident report provided by respondent and then changed his causation opinion that claimant’s low back injuries were not work related. Dr. Hufford, after reviewing additional medical records, also concluded that the June 11, 2007, lifting incident did not cause claimant’s lumbar spine injury. Although it is unclear from the records of Neosho Medical whether claimant did or did not report an injury at home, there is ample evidence to support the opinions of Drs. Shriwise and Hufford that claimant’s lumbar spine injury was not the result of her June 11, 2007, accident.

Dr. Edward J. Prostic, claimant’s expert, relates claimant’s lumbar and left leg complaints to the accident on June 11, 2007. Dr. Prostic’s 2007 and 2010 reports do not indicate that he reviewed Ms. Ahlquist’s records before rendering his causation opinion. In rendering his causation opinion, Dr. Prostic appears to have relied on claimant’s assertion that she sustained a low back injury on June 11, 2007. Dr. Prostic attempted to minimize the importance of Dr. Kueser’s records indicating that claimant had mid back pain by testifying that initial medical providers have documented thoracic pain that ultimately turns out to be in the lumbar spine. However, claimant circled the mid-to-upper back on the report of accident, while Dr. Prostic indicated claimant had pain in the center part of the low back **below** the waist. Simply put, claimant failed to prove that she sustained a lumbar spine injury arising out of and in the course of her employment with respondent.

Because of the foregoing findings, it is unnecessary for the Board to decide the other issues raised by claimant.

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<sup>3</sup> Shriwise Depo., Ex. 3.

<sup>4</sup> *Id.*

As required by the Workers Compensation Act, all five members of the Board have considered the evidence and issues presented in this appeal.<sup>5</sup> Accordingly, the findings and conclusions set forth above reflect the majority's decision and the signatures below attest that this decision is that of the majority.

**CONCLUSION**

1. Claimant failed to prove that as result of her thoracic spine injury, she sustained a permanent functional impairment.
2. Claimant failed to prove that she sustained a lumbar spine injury by accident arising out of and in the course of her employment with respondent.
3. It is unnecessary for the Board to consider the remaining issues raised by claimant.

**AWARD**

**WHEREFORE**, it is the decision of the Board that the Award of Administrative Law Judge Bruce E. Moore dated March 1, 2013, is affirmed.

**IT IS SO ORDERED.**

Dated this \_\_\_\_\_ day of August, 2013.

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BOARD MEMBER

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BOARD MEMBER

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BOARD MEMBER

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<sup>5</sup> K.S.A. 2012 Supp. 44-555c(k).

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Bruce E. Moore, Administrative Law Judge